No. 398.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

VS.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Brief of Appellees.

W. B. WALLACE,
Counsel for Appellees.

Filed February ..... , 1898.

..... *Clerk.*

Times Print, Visalia, Cal.

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APPELLANT,
vs.
OTTO GROECK AND C. S. MERRILL, JR.,
APPELLEES.

Brief of Appellees.

The defense to this suit embodies two general propositions.

I.

THE LAND IN CONTROVERSY, AT THE DATE OF DEFENDANT GROECK'S ENTRY THEREON, WAS EQUALLY SUBJECT TO ENTY BY A SETTLER, OR SELECTION BY PLAINTIFF, UNDER THE DIRECTION OF THE SECRETARY OF THE INTERIOR, UNLESS RESERVED BY EXECUTIVE ORDER, AND THE ACTS OF THE LAND DEPARTMENT IN PERMITTING PLAINTIFF TO ENTER THE SAME AND IN ISSUING A PATENT TO HIM OPERATED AS A RE-

VOCATION IN PART OF ANY PRIOR ORDER OF WITHDRAWAL.

II.

THAT WHETHER THE FOREGOING PROPOSITION BE WELL FOUNDED OR NOT, PLAINTIFF IS IN THIS SUIT BARRED BY REASON OF ITS LACHES IT NOT EXERCISING DILIGENCE IN DEFINITELY LOCATING ITS ROAD, SELECTING THE LAND, AND COMMENCING THIS SUIT.

PROPOSITION I.

Under this head and included in this proposition, we contend:

1. That appellant's grant is not an absolute grant of quantity, the word "amount" in section three of the granting act in view of the indemnity and other provisions being used simply as a word of enumeration and having no greater force or effect than would the word "number," "extent," or "limit."

2. That the act under which appellant claims is a grant *in praesenti* of the specific alternate odd sections within twenty miles on each side of the road as definitely located *and of these only*, with the privilege of supplying losses occurring within the granted limits from the indemnity limits by selections under the directions of the Secretary of the Interior.

3. That the right to acquire indemnity lands is dependent upon the status of the land at the date of selection, and when patented to the company the title relates back only to the time of selection.

4. That the words "hereby granted" in section six of the aforesaid granting act refer only to the alternate odd sections within twenty miles of the line of road on each side, and said section six operates to withdraw only the lands within the primary limits.

5. That the withdrawal of the alternate odd sections within the indemnity limit of appellant's grant is dependent solely upon executive action; and that any executive withdrawal thereof could be revoked in part, or as a whole, at any time and said land restored to the public domain.

6. That the words "under the direction of the Secretary of the Interior," in section 3 of said act mean in accordance with the rules and regulations promulgated by the Secretary of the Interior and subject to his supervision and approval.

The uniform rulings of the land department for a great many years confirm these views.

There have been but three general classes of railroad land grants recognized by the land department.

1. A grant of quantity as the grant to the

Burlington and Missouri River Railroad (13 Statute, 350), which had no lateral limits and contained no indemnity provisions.

2. A grant of lands in place.

3. A grant of lands in place for a certain distance on each side of the line of the road with a provision for selecting other lands within restricted limits under certain regulations to supply losses in place, as the grants of 1856 and the grant under which appellant claims.

CONSTRUCTION OF THE LAND DEPARTMENT.

Pre-emption claims were allowed on indemnity grant lands by order of the General Land Office as early as 1858.

Lester's Land Laws and Regulations, 511.

By the method of procedure of the Interior Department provided for making indemnity selections under railroad grants and which were adopted January 24th, 1867, the selecting agent is required to state in an affidavit among other things, "That the said lands *are vacant unappropriated*, and are not interdicted or reserved lands."

Zabriskie's Land Laws of the U. S., p. 285.

Upon the filing of an indemnity selection if found correct, the register and receiver of the local land office are required to certify, amor g

other things, "nor is there any *homestead*, *pre-emption*, state or other valid *claim to any portion of said lands on file or of record in my office.*"

Id., 286.

On March 22d, 1867, the Commissioner of the General Land Office in a letter of instruction to the registers and receivers of the local land offices construed the grant to appellant under the said act of 1866 in these words: "The grant for this road is found in the 18th section of the above act. By that section this company is granted *every alternate or odd numbered section of public land for ten sections in width* on each side of the line of route, and indemnity for lands sold, reserved or otherwise appropriated within the grant, from the alternate odd sections of unappropriated land not more than ten miles *beyond the limits of the granted sections. The limits of the grant then are twenty miles on each side of the road*, and of the indemnity, thirty miles on each side."

Zabriskie's Land Laws of the U. S., 293.

In 1879 Secretary Schurz held that under a grant similar to appellant's the grant will not operate upon indemnity lands until the same have been selected in the manner provided by law.

Blodgett vs. Cal. and Or. R. R. Co. Copp's Public Land Laws, 814.

The whole subject of selecting indemnity

lands for appellant is placed, "Under the direction of the Secretary of the Interior." The power to direct a proceeding implies not merely oversight in minor details, but control, supervision, *discretion*, and power to adjudge when, in what manner, to what extent, the statute requires the exercise of such control and *discretion* as to give the public as well as the grantee all the rights and privileges granted by law.

N. P. R. R. Co., 11 Dec. Dept. Int., 511.
Knight vs. United Land Ass'n, 142 U. S., 161.
Elling vs. Thexton, 16 Pac. Rep., 93.

In Brady vs. S. P. R. R. Co. it appears that Brady entered upon the land there in contest prior to the revocation of the order of withdrawal and was permitted to make a homestead entry thereon, and upon an appeal from the decision awarding him the land the acting Secretary of the Interior says: "If it is within the power of the department to revoke the withdrawal as to all the lands, it surely has the power to revoke the withdrawal of part of said land, and *the decisions of the department that have crystalized into a general rule may become as effective for that purpose as the order of the Secretary directly withdrawing all the lands.* All questions as to the preference rights of settlers to the public lands must be raised and decided in the local

office, and a failure so to assert their rights and to bring the same before the general land office by appeal will estop them from asserting their rights."

Brady vs. S. P. R. R. Co., V Dec. Dept. Int., 658.

On May 20th, 1887, Secretary Lamar in a letter to the President, set forth a list of a vast number of withdrawals of railroad indemnity lands, of which he says: "These withdrawals, as shown by this table, have been running and continued in operation for more than two years in the case of the Ainsworth and Swank Creek Railroad to nearly thirty-seven years in that of the Mobile and Ohio.

"Under the rulings of this department, no settler can acquire any right under any of the general land laws to any part of the public domain, so long as the same remains withdrawn by order of the President or by his authority.

"There seems to be no valid reason why these orders of withdrawal should not be revoked. *Obstructions in the way of bona fide settlement of the public domain should be removed as speedily as possible after the reasons which created them have ceased to exist.*" The Secretary then suggested that notice be given to the managers of said Railroads to show cause why the withdrawal of indemnity lands for their benefit should

not be revoked. This action was approved by the President, an order to show cause made by the Secretary, and after answer made to said order by the appellant here and many other Railroad Companies the Secretary filed an elaborate decision in the matter of the Atlantic and Pacific Railroad Company, the terms of the grant to which are identical with those of the grant to appellant and are contained in the same act. 14 Stat. 292.

The Secretary says: "*Now here was a grant to the free alternate odd numbered sections to be found within twenty miles on each side of the road in the States* and within forty miles in the Territories with the right to take the free odd numbered sections found within a further limit of ten miles, as indemnity for lands lost in the granted limit; the order was for the survey of the land 'for forty miles in width' *or only to the extent of the granted limit in the Territories, and ten miles beyond the granted and indemnity limit in the States.* While surveys were to be made to this extent the withdrawal of lands after the general route shall be fixed from sale or entry or pre-emption before or after survey only related to '*the odd sections hereby granted*' this plain statement shows the *contract of the Government was to give the stated quantity of land if it could be found free within the granted limit.* As to the indemnity land the Secretary says: "Here

the interest of the Company was so remote and contingent being a mere potentiality and *not a grant*, that congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories.

"*It is appa ent from the granting clause of said act that the grant was not one of quantity, but for a certain number of sections in place;* and if not there then it gave the privilege of looking for the deficiency in restricted limits. Had congress intended the company should absolutely have the full quantity of land designated it would not have restricted the right to select the odd sections within ten miles, but would have placed no limit upon the right of selection, as in this case of the Burlington and Missouri River Railroad. (98 U. S. 334.)

"On a full consideration of the whole subject I conclude that the withdrawal for indemnity purposes if permissible under the law was solely by executive authority and may be revoked by the same authority; *that such revocation would not be a violation of either law or equity and that said lands have been so long withheld for the benefit of the Company, the time has arrived when public policy and justice demand the withdrawal to be revoked and some regard had for the rights of those seeking and needing homes on the public domain.*

"If I had any doubt I should be confirmed in this course by what may be regarded as a distinct recognition by congress of the correctness of its policy to be found in section 3 of the act of April 21st, 1876 (19 Stats., 35), where it is said:

" 'That all such pre-emption and homestead entries, which may have been made by the permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grants shall be deemed valid; and a compliance with the laws and the making of the proof required shall entitle the holder of such claims to a patent.' "

6 Dec. Dept. Int., 77, 79, 84-93.

The Secretary thereupon made an order revoking the withdrawal of indemnity lands upon the lines of a great number of railroads including plaintiff's.

Id., 84-93.

Indemnity cannot be allowed for losses sustained through the erroneous certification of lands in place to another company, or for lands sold by the government after definite location of of the road. The remedy in such cases must be sought in Court.

Secretary Lamar, 6 Dec. Dept. Int., 196.

In a leading case cited by Secretary Vilas involving the construction of an act granting lands to the Northern Pacific Company, the granting and withdrawal clauses of which are in the exact language of those under which the appellant claims, the Secretary says in a very lengthy decision: "In my opinion, and it is with great deference that I present it, the granting act did not only not authorize a withdrawal of lands within the indemnity limit, but forbade it. The difference between lands in the granted limit and lands in the indemnity limit, and between the time and manner in which the title of the United States changes to and vests in the grantee accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well settled rules upon this subject."

As to lands in the primary or granted limits:

"The title to the alternate sections to be taken within the limit when all the odd sections are granted, becomes fixed, ascertained and perfected by this location of the line of road, and in case of each road the title dates back to the act of Congress."

St. Paul R. R. Co. vs. Winona R. R. Co., 112 U. S., 726.

Mo. Kas. & Tex. R. R. Co. vs. Kas. Pac. R. R. Co., 97 U. S., 491-501.

Van Wyck vs. Knevals, 106 U. S., 360.

Cedar Rapids Co. vs. Herring, 110 U. S., 27.

Grinnell vs. R. R. Co., 103 U. S., 739.

As to indemnity limits:

"The time when the rights to lands become vested which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limi of the location of the line of the road. In Ryan vs. R. R. Co., 99 U. S., 382, the Court speaking of a contest of lands of this class, said: 'It is within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specifically selected as it was for that purpose. * * * with respect to the lieu lands as they are called the right was only a float, and attached to no specific tracts, until the selection was actually made in the manner described.'" Continuing, the Secretary says: "It was a vast grant, and even as so limited a threatening shadow to fall on the settling of the Northwest. Well might Congress say, 'the lands granted you shall have, but you shall tie up no

more from the actual settler to the prevention of development.' "

In speaking of the rule of the land department requiring a specification of losses in making selections the Secretary further says: "It was in obedience to the last clause that this company filed on the 25th of October, 1887, the list of particular deficiencies upon which the claim of selections in list No. 2 before mentioned was based. That list excellently illustrates the necessity for the rule mentioned. Since 1883 the claim of this company to take the 58,000 acres in list No. 2 has remained a cloud upon all the lands embraced within it. Yet when called upon to specify particular lands lost from the granted limits for which such a right of selection can vest, only 4011 acres are shown, except by claiming indemnity for about 55,000 acres of land for the most part not particularly defined, lying within the Yakima Indian Reservation * * * The tracts listed as lost to the grant because lying within the Yakima Indian Reservation in fact passed to the company by the grant, and afford no basis to select others in lieu thereof."

The facts recited in this decision show the imperative necessity of having all lieu land selections subject to the final examination and approval of the Secretary of the Interior.

Northern Pacific R. R. vs. Miller, VII, Dec. Dept. Int., 100.

A homestead entry allowed for lands embraced within an indemnity withdrawal is not illegal, and on the revocation of the withdrawal is relieved from conflict with the railroad grant, if no selection of the land has been made thereunder.

Mudgett vs Dubuque and Sioux City R. R. Co., VII Dec. Dept. Int., 242.

Secretary Noble held in S. P. R. R. Co. vs. Barry that "a settlement acquired and maintained in good faith after the revocation of an indemnity withdrawal is entitled to priority as against a subsequent selection by the company."

S. P, R. R. vs. Barry, XI Dec. Dept. Int., 494.

In N. P. R. R. Co. vs. Walters, referring to the decision in the Price County case, 113 U. S., 496, and the cases there cited, the Secretary says: "I do not think it was intended to overthrow this long line of decisions and to lay down a different rule in the case of St. Paul and Pac. R. R. Co. vs. N. P. R. R. Co., 139 U. S., 1. In that case it was held that there not being a sufficient quantity of lands in Minnesota to meet the requirements of the N. P. R. R. Co., the lands there in question (being those which were in the granted limits as shown by the map of general route and withdrawal thereunder, and within the indemnity limits on definite location) were so appropriated as to come within the terms of exceptions in the

subsequent grant and that as to those lands no selection was necessary to preserve said company's right against the subsequent grantee." The grant to the "subsequent grantee" there excepted all lands *reserved by any competent authority.*

N. P. R. R. Co. vs. Walters, XIII Dec. Dept. Int., 145.

In the S. P. R. R. Co. vs. McWharter it was urged under the authority of the decision in 139 U. S., 1, that the act making the grant withdrew the land "in the forty mile limit" and that no selection was required to save the company's right of selection, it being shown that there was a deficiency in the grant. Secretary Noble says in his decision in this case: "I deem it unnecessary to refer to the decision (139 U. S., 1), further than to say it has no application to the facts in this case.

"I might remark in passing that if the construction insisted upon by counsel be correct then a reservation exists ten miles beyond the indemnity limit of this grant in this State, as it is limited to thirty miles on each side of the road in the selection of its indemnity.

"*The withdrawal contemplated by the sixth section of this act has been uniformly construed to relate only to the primary or granted lands*, and the validity of any further withdrawal upon the

filing of said map rests entirely upon executive action."

S. P. R. R. Co. vs. McWharter, XIV Dec, Dept. Int., 610.

Secretary Smith in a similar case to the above considered the decision in 139 U. S., 1, and held that *the fact that a deficit exists in the grant does not relieve the company from the necessity of selection to acquire title to indemnity lands.*

N. P. R. R. Co. vs. Davidson, XVI Dec. Dept. Int., 457.

A homestead entry of land included within an indemnity withdrawal but for which the right of selection had not been asserted at the date of final proof, and prior to the revocation of the withdrawal, is not defeated by *a mere protest of the company against the final proof filed while the withdrawal is in force.*

S. P. R. R. Co. vs. Waters, XVII Dec. Dept. Int., 270.

In a recent case decided by Secretary Smith, March, 1894, it was again insisted by the company that there was a statutory withdrawal of the odd sections within its indemnity limit. The Secretary in his decision says: "*It has been the uniform construction of this department that the requirement to withdraw land on account* of the Pacific railroad grants upon the location of the

roads *extended only to the granted limits;* that all withdrawals of indemnity lands on account of these grants rests on executive action alone, and consequently that such indemnity withdrawals might be revoked whenever in the judgment of the Secretary of the Interior the necessities of the case required it. * * * The decision of the Supreme Court in the case of the St. Paul and Pac. R. R. vs. N. P. R. R. Co. (139 U. S., 1) *is not authority for holding that any rights attached within the indemnity limits prior to selection, sufficient to amount to an appropriation of the land as against the United States and bar other disposition of the same*, for if it is then the orders of August 15th, 1887, were ineffective, as restoration could not be made of lands already appropriated. * * * As between the two grant claimants it may however be admitted that all the lands within the indemnity limits will but partly satisfy the indemnity grant, and as against such subsequent grant the Court holds that nothing can be taken within such indemnity limit, as by its own admission they became appropriated upon the definite location of the line of road on account of which the prior grant was made. That this was as far as the Court meant to go in that case clearly appears by its decision in the case of the U S. vs. Colton Marble and Lime Co. (146 U. S. 615). In that case the Court says:

" 'The ordinary rule with respect to land within indemnity limits is that no title passes until selection. Where as here the deficiency in the granted limit is so great that all the indemnity lands will not make good the loss, it has been held in a contest between two railroad companies, that no formal action was necessary to give them to the one having the older grant as against the other company.'

"I see nothing in the argument of counsel to warrant a charge in the uniform construction of these grants."

Southern Pacific R. R. Co. 18 Dec. Dept. Int., 314.

In N. P. R. R. Co. vs. Lillethum, 21 Dec. Dept. Int. 487, it was s renuously urged that indemnity land is land "Hereby granted" and was withdrawn from sale by the granting act, and Beach vs. Wood was cited as authority for this position. Secretary Smith, in ruling against the company, says: "It is not necessary to make further citations as to a construction so well settled and which may be said emphatically to be uniform."

The right of the S. P. R. R. Company to select indemnity land is dependent on the status of the land at date of selection.

S. P. R. R. Co. vs. McKinley, 22 Dec. Dept. Int., 496.

Secretary Francis held that land within the indemnity limits of the N. P. R. R. Co. is open to settlement and entry

N. P. R. R. Co. vs. Ayers, 24 Dec. Dept. Int., 40.

So held Secretary Bliss, the present Secretary.

Muller vs. N. P. R. R. Co. 24 Dec. Dept. Int., 436.

If a different construction is placed by this Court upon the grant in question then the whole system adopted by the Land Department of the United States for the administration of appellants and all similar indemnity land grants and so long followed by that department has been erroneous, and will be overthrown.

As additional instances:

1. It is held that odd sections within the primary limit which where not free at the time of filing the map of definite location could not pass to the company but that odd sections within the indemnity limit which though not free at the date of definite location became free afterwards could be selected as lieu lands.

Ryan vs. C. P. R. R. Co. 99. U. S. 282.

2. The Statute (10 Statute 244 and Sec. 2357 Rev. St.) provides that the price to be paid for alternate reserved sections along the line of a railroad *within the limit granted* shall be $2.50

per acre and this Statute has been restricted to lands within the *primary limit* of the grant.

Zabrieskie, 293.

3. The Act of June 22, 1874 (18 St. 194), provides that in the adjustment of all railroad land grants if any of the lands granted be found in the possession of an actual settler, whose entry or filing has been allowed at the time at which, by the decision of the land office, the right of said road was declared to have attached, the grantee upon relinquishment might select an equal quantity of other lands in lieu thereof from any of the public lands not mineral within the limits of its grant.

But it is held that lands within the indemnity limit of the grant do not afford a basis for relinquishment and selection under this act.

St. Paul and Sioux City R. R. Co 10 Dec. Dept. Int., 50.

U. S. vs. St. Paul and Sioux City R. R. Co., 10 Dec. Dept. Int., 509.

Instruction to Registers and Receivers 11 Dec. Dept. Int., 434.

The above authorities contain a history of the uniform construction of plaintiff's grant and other similar grants by the officers of the land department for a long period of years. These officers in the expressive language of the Supreme

Court "are usually able men and masters of the subject."

If there were any ambiguity or doubt then such a practice begun so early and continued so long would be in the highest degree persuasive if not absolutely controlling in its effect.

U. S. vs. Graham, 110 U. 219.
U. S. vs. Philbrick, 120 U. S. 59.
Hasting D. R. R. Co. vs. Whitney, 132 U. S. 161.
Noble vs. Union River Logging Co., 147 U. S. 965.

In U. S. vs. Burlington & Missouri River R. R. Co., Supra, this Court said: "This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It can not at this day be called in question."

THE WITHDRAWAL CLAUSE FURTHER CONSIDERED.

Many of the acts passed by Congress in 1856, granting lands in aid of railroads, including those to Iowa, Wisconsin and Minnesota, contained withdrawal clauses similar to that in plaintiff's grant. They provided that the lands "hereby granted for and on account of said roads shall be exclusively applied in the construction

of that road for and on account of which said lands are hereby granted." Such provisions formed part of the acts construed in the Herring case, 110 U. S., 27; the Barney case, 117 U. S., 228; the Price County case, 133 U. S., 496; and in U. S. vs. The Mo. K. T. R. R. Co., 141 U. S., 358. These are as strong expressions as are found in plaintiff's grant, and it has never been held that they constituted legislative withdrawals of indemnity lands even after definite location of the line of road.

Many decisions have been rendered by the Circuit Courts in reference to lands within the primary limits of the grant to the Northern Pacific Company and situated in Territories; none of which declare that the act creating the grant withdrew the land from market beyond the primary limit. Nearly all of them quote the Butz case as authority for the doctrine that within the Territories the land is withdrawn for forty miles on each side of the road. By these decisions the expressions "*limits of the grant*," "*within its grant*," "*lands hereby granted*," are restricted to lands in the primary limits.

Denny vs. Dobson, 32 Fed., 899.

N. P. R. R. Co. vs. Cannon, 46 Fed. Rep., 224.

N. P. R. R. Co. vs. Amacker, 46 Fed., 223.

N. P. R. R. Co. vs. Cannon et al., 46 Fed., 237.

N. P. R. R. Co. vs. Sanders, 47 Fed., 239.

U. S. vs. Ordway, 30 Fed., 30.

On the principle that the expression of one thing is the exclusion of another, is it not the effect of all these decisions to declare that lands within the indemnity limits of the Northern Pacific Railroad grant are not withdrawn from market by the granting act?

In Denny vs. Dobson, the Court said: "There does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a Territory or in a State. If in the former, the grant has twice the extent that it has when located in the latter."

All the decisions of the U. S. Supreme Court holding plaintiff's and other similar grants to be *in presenti* limit the expression to lands within the primary limits.

In a very recent decision, the U. S. Supreme Court, in construing the grant to the N. P. R. R. Co., said: "Neither is it intended to question the rule that the title to indemnity lands *dates from selection and not from grant.*

N. P. R. R. Co. vs. Musser-Sauntry Land Log. and Mfg. Co., 18 Sup. Ct. Rep., 205.

If then title to indemnity lands does not when selected relate back to the date of the grant, they are not within the terms "lands hereby granted," which necessarily refer to a present grant. Congress in this case granted certain specific lands and a mere privilege to the company to select if it chose other lands to supply deficiencies.

We are not without legislative construction as to the extent of the withdrawal contemplated as is disclosed by the grant to the Texas Pacific R. R. Co.

The lines of every one of three great roads having land grants in almost the same language lay through two States and from two to four Territories—The Northern Pacific, the Atlantic Pacific, and the Texas Pacific. The granting acts of the two former in general terms granted "every alternate section designated by odd numbers to the amount of twenty alternative sections through the Territories, and ten alternative sections through the States, and created a legislative withdrawal of "the lands hereby granted."

For nearly a thousand miles the line of the Texas Pacific road lay through the State of Texas, in which State the government owned no land, and for that reason it became necessary to omit that State from the terms of both the granting and withdrawal clauses. The latter authorizes the Secretary of the Interior, upon filing the

map of general route to "cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California to be withdrawn from pre-emption, etc., but provides that the homestead and pre-emption laws are extended to all other lands in the United States along the line of said road when surveyed, 'except those hereby granted to said company.'" This grant was made March 3d, 1871.

16 U. S. Stat. at Large, 573.

The proviso is the same in all three grants and lands within the indemnity limits are certainly "on the line of said road."

In the Wiggs case, plaintiff's map of 1867 was treated by plaintiff and found by the Court to be a map of definite location; it was also alleged in that case that all the lands in the indemnity limits of plaintiff's grant would only in part supply the deficiencies in the granted limits. The construction placed upon the granting act by the land department does not appear to have been considered, nor does it appear from the decision that the Court was apprised of the fact that the executive order of withdrawal had been revoked. The question of laches was not considered; the complaint alleges that the selection list was rejected *for the sole reason that said land was patented by Walter Wiggs.* There

too it appears that the complainant contested Wiggs's right to preempt the land through all the various departments of the land office to final decision by the Secretary.

In this case, in the Wiggs case, and in the Araiza case the cases of Buttz vs. N. P. R. R. Co., and Denny vs. Dobson appear to have been construed by the learned Judges who decided the three former as announcing the doctrine that on filing the map of general route by the grantee, the law withdrew from other disposition the land within forty miles of the line of road through states, as well as territories, while as already shown they appear to have held the contrary as to the line through states, by limiting the withdrawal to the lines of the granted limits in the Territories.

Plaintiff's allegation here as to its map of designated route is so worded that it is difficult to determine whether it is to be considered a map of general route or of definite location. Certainly plaintiff cannot claim that it is a map of definite location for the purpose of fixing the time when its grant takes effect as to lands in the primary limits and not one of definite location, for the purpose of determining the time when its right to select indemnity land first arose.

What Justice Brewer said regarding a legislative withdrawal in Wood vs. Beach was un-

necessary to the decision of that case, as the land there involved had been withdrawn by the land department and Wood was a mere trespasser whose claims were not recognized by that department. Had that eminent jurist the the present case before him, he would probably say what Justice Field stated in Barden vs. N. P. R. R. Co., "It is more important that the Court should be right upon later and more elaborate consideration than consistent with previous declarations."

CONSTRUCTION OF THE RIGHT OF SELECTION UNDER THE SCHOOL LAND GRANT.

The grants to States of the 16th and 36th sections and the 500,000 acre grant for the maintenance of public schools come nearer being *grants of quantity* than plaintiff's grant, and yet it has been uniformly held that the right of the State to select lieu lands for deficiencies in these grants must be made upon lands upon which there is no subsisting valid claim by pre-emption or otherwise, *at the time of selection;* that the statute gives the State no indefeasible right to select any particular tract of land.

Shepley vs. Cowan, 91 U. S., 330.
McCreary vs. Hiskell, 119 U. S., 327.
Terry vs. Megerle, 24 Cal., 623.

THE SECRETARY ACTS JUDICIALLY IN EXAMINING AND PASSING UPON INDEMNITY SELECTIONS, AND HIS APPROVAL IS NECESSARY.

U. S. vs. C. P. R. R. Co., 26 Fed R., 439.
Wisconsin Cent. R. R. Co. vs. Price County, 133 U. S., 496.
Elling vs. Thexton, 16 Pac., 931.
Resser vs. Carney, 54 N. W. R., 89.
Grandin vs. LaBar, 59 N. W., 241.

The last three cases concerned indemnity lands claimed by the N. P. R. R. Co., and the last one in emphatic terms repudiates the decision of the same Court in N. P. R. R. Co. vs. Barnes relied on by plaintiff.

The Secretary of the Interior, in passing upon lieu land selections and in adjusting plaintiff's grant is certainly charged with the duty of determining. 1. Whether it has not exhausted its claims to indemnity lands, 2. Whether a proper basis has been assigned, 3. Whether the basis assigned has been lost to plaintiff by its laches, by mistake of the Land Department, by reason of its falling within the granted or indemnity limits of some other road having a prior grant, 4. Whether at the time of selection it has not already been selected by the State as lieu school land, 5. Whether or not it has been granted to the State as swamp land or is mineral land, or was *sub judice* at the time the company

offered to select it. In determining these facts, the Secretary exercises judicial functions. If plaintiff's contention be correct, then the determination of all these questions is a matter for the plaintiff and when its list of selections is filed, the facts stated in the application to select must be considered by the Land Department of the Government as conclusively proven. It is not stated in this case why the offered selection was rejected nor does the action of the local land officers appear to have been brought to the attention of the Commissioner or Secretary, for the consideration of either of these officers.

In the Wiggs case, it was shown that the offer to select in that case was rejected for the "Sole reason that the land had been patented to Walter Wiggs."

The Rules of Statutory Construction sustain our position as to the first proposition.

We have the uniform construction by the officers of the Land Department for a long period, the legislative construction of Congress as shown in the Texas Pacific grant, and the decisions of the Supreme Courts of Montana, Minnesota and North Dakota; also the decisions of the U. S. Supreme Court construing other grants in aid of railroads. Certainly, if without these the Court were inclined to hold against us, their existence

at least show that the granting act is couched in ambiguous terms.

If the terms of a grant admit of different meanings, one of extension, and one of limitation, they must be accepted in a sense favorable to the grantor.

Dubuque, etc. vs. Litchfield, 23 Howard, 66.
Bardon, vs N. P. R. R. Co. 154 U. S. 288.

To determine the construction of an act, all parts of the act and all acts *in pari materia* and the entire system of laws on the subject must be taken and considered together.

1 Bac. Abr. (Statutes) 1. 3.
U. S. vs. Freeman, 3 How., 556.
Carter vs. Ryan, 93 U. S. 78.

PROPOSITION II.

PLAINTIFF IS BARRED BY ITS OWN LACHES.

In R. R. Co. vs. Herring, 110 U. S. 27, the Court said at pages 41 and 42:

"If he plaintiff has been injured, it is by its own laches. It there is no land to satisfy its demand, it is because it has delayed over three years to file its map to establish the line of its road, and for years after to make selections. It is unreasonable to say that during all that time these valuable lands were to be kept out of the

market when the country was rapidly filling up with an agricultural population, settling and making valuable farms on them."

This case is directly in point, for as to one tract of land involved it was entered by the settler after the map of *definite location* of the road was filed, and as we have shown, the grant involved contained words excluding the lands "hereby granted" from other disposition.

In Galliher vs. Cadwell, 145 U. S. 368, the Court said:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party had good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

See also Curtner, vs. U. S. 149 U. S. 662.

The Government, through its Interior Depart-

ment, was warranted in assuming that plaintiff's scheme to build a through line of railroad along or near its line of general route had been abandoned as it undoubtedly has, for it has never been completed, and from Alcade to Tres Pinos its grant has been declared forfeited.

There are peculiar circumstances connected with this case which afford the strongest grounds for invoking and applying the doctrine of laches. If the map filed by plaintiff in 1867 was a map of general route, it neglected for more than twenty years to fix its line of definite location; if that map was one of definite location, it neglected for as many years to apply to select this land; it waited more than six years after defendant acquired an adverse interest in the land before bringing this suit and more than four years after the Secretary of the Interior had revoked its order of withdrawal. Because thousands of settlers were occupying and receiving patents for these indemnity lands, it was the duty of plaintiff, if it intended to continue the assertion of a claim to them, to procure a judicial interpretation of its grant from that tribunal to which alone the Land Department yields its construction. It did not do so. It took measures to prevent that Court from considering those provisions of the grant it claims under here.

On June 23rd, 1890, Judge Sawyer rendered

his decision in the Wiggs case. It was appealed to the Supreme Court, and on June 3rd., 1895, it was docketed and dismissed by the appellee.

15 Sup. Ct. R. 1044.

In the spring of 1890, the Circuit Judge of the Southern District of California rendered decisions in three cases, including that of the S. P. R. R. Co. vs. Tilley, (41 Fed. R. 729) on the same character of claims to indemnity lands it presents here. These decisions were adverse to plaintiff. It appealed, but five years later appellant not appearing these appeals were docketed and dismissed by the appellee.

16 Sup. Ct. R. 1206.

On November 20th., 1890, the same Court decided two similar cases S. P. R. R. Co. vs. McCutchen and S. P. R. R. Co. vs. Graham, against the plaintiff. Plaintiff appealed and in March 1895, when the cases were called for hearing, the company rather than submit the points so long decided against it by the Land Department to the Supreme Court of the United States, procured on its own motion the dismissal of these cases, notwithstanding the fact that these indemnity lands were being continuously patented to settlers.

15 Sup. Ct. R. 1042.

Defendant necessarily has been injured by this delay. He has been without the use of the money he paid for this land which, though not a large amount, is to the ordinary settler of great value. He has been injured to the extent of whatever improvements he has placed upon the land to the value of the time and expense incurred in occupying, cultivating, and improving it.

Plaintiff's complaint is barren of equity.

In conclusion, it may not be improper to say that if plaintiff's claim be sustained, the titles to thousands of homes established within the indemnity limits of a number of land grants will be destroyed, as settlers have been invited to occupy and found homes on these lands, from August, 1887 to the present day, by that department of the Government especially charged with the disposal of public lands.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

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